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# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

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ARTHUR CALDERON,

*Petitioner,*

v.

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF CALIFORNIA

*Respondent,*

BLUFFORD HAYES, JR.,

*Real Party in Interest.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI

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DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WILLIAM G. PRAHL
Deputy Attorney General
Counsel of Record
1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5262
Fax: (916) 324-2960
Counsel for Petitioner

43 pp

## CAPITAL CASE

## QUESTIONS PRESENTED

1. Does a ruling by the Ninth Circuit Court of Appeal rejecting the express holding of the California Supreme Court regarding that court's consistent and routine application of its timeliness procedural bar offend the basic principles of federalism and comity underlying the procedural default rule?

2. Do the principles of comity and federalism prohibit the Ninth Circuit from placing a burden of proof on the state to prove that its timeliness requirements for capital habeas cases have been regularly and consistently applied before the federal courts will limit federal collateral review of claims which were not timely presented to the state courts?

3. May the Ninth Circuit refuse to honor a forty-year-old state procedural bar which precludes habeas corpus from being used as a substitute for appeal where there has been no showing that the state failed to consistently and regularly apply the default?

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Arthur Calderon, Warden of California State Prison at San Quentin, ("the warden") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case in which Bluford Hayes, Jr., is the Real Party in Interest (hereinafter Hayes).

## OPINION OR JUDGMENT BELOW

The opinion of the United States Court of Appeal for the Ninth Circuit is reported as 96 F.3d ___ (9th Cir. 1996), denying petitioner's petition for a writ of mandamus. A copy of that decision is attached as Exhibit A to the Appendix to this petition for writ of certiorari. The order of the United States District Court for the Eastern District of California that denied petitioner's motion for summary dismissal is unreported and is reproduced and attached as Exhibit D to the Appendix.

## STATEMENT OF JURISDICTION

The warden timely invokes the Court's jurisdiction pursuant to 28 U.S.C. section 1254(1). The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 20, 1996.

## CONSTITUTIONS, STATUTES OR REGULATIONS

Article VI, Clause 2, of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be

> the supreme law of the land; and the judges in every state shall be bound thereby; any thing in the Constitution or law of any state to the contrary notwithstanding.

The Tenth Amendment of the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Section 2254 of title 28, United States Code, provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

## STATEMENT OF THE CASE

On January 22, 1982, Real Party in Interest Blufford Hayes, Jr., was convicted in San Joaquin County of first degree murder, with the use of a firearm and in conjunction with the special circumstance that the murder of Vinod Patel occurred during commission of a burglary by Hayes within the meaning of California Penal Code section 190.2, subdivision (a). 17(g). The appeal to the California Supreme Court was automatic.

On October 29, 1987, Hayes, with the assistance of his appointed counsel, filed a petition for a writ of habeas corpus in the California Supreme Court which raised four issues. On May 18, 1989, the California Supreme Court vacated the order to show cause which had been issued in the habeas corpus proceeding as

improvidently issued and denied the petition on the merits.

On December 31, 1990, the California Supreme Court unanimously affirmed the conviction in Hayes' automatic appeal in *People v. Hayes*, 52 Cal.3d 577 (1990). This Court denied a petition for certiorari on November 12, 1991. *Hayes v. California*, ___ U.S. ___, 112 S.Ct. 420 (1991).

On April 14, 1992, Hayes sought appointment of counsel in the United States District Court for the Eastern District of California. Counsel, including the attorney who represented Hayes in the state appellate proceedings, were not formally appointed until October 27, 1992.

On June 22, 1993, Hayes filed a federal petition for writ of habeas corpus in the district court, which alleged 63 claims. *Hayes v. Vasquez*, No. CIV-S-592-0603 DFL/GGH.

On July 29, 1993, the California Supreme Court filed its opinion in the cases of *In re Clark*, 5 Cal.4th 750 (1993) and *In re Harris*, 5 Cal. 4th 813 (1993).

On February 4, 1994, the federal proceeding was stayed pending Hayes' exhaustion of 44 claims in state court.

On April 22, 1994, Hayes filed his second state petition for writ of habeas corpus which contained 44 claims. The California Supreme Court denied this second petition on June 21, 1995, pursuant to *In re Clark*, finding that 32 claims were untimely, and barring three other claims pursuant to *In re Dixon*, 41 Cal.2d 756 (1953). A copy of this order is included as Exhibit B in the Appendix.

On June 14, 1995, Hayes filed his amended petition for writ of habeas corpus in the district court which contained 65 claims, including the 35 procedurally barred claims.

On July 18, 1995, the state filed a motion to dismiss the 35 claims on the grounds that these claims

were procedurally barred for failure to comply with California's independent and adequate state procedural rules of default.

On January 22, 1996, the magistrate judge, pursuant to a referral by the district court under 28 U.S.C. section 636, subdivision (b)(1)(B), and Local General Order No. 262, filed Findings and Recommendations (hereinafter, "Findings"), wherein the magistrate judge denied the motion by the warden, to dismiss these 35 defaulted claims. A copy of these Findings is included as Exhibit C in the Appendix.

On April 10, 1996, the district court, over the State of California's objections, filed an order adopting the magistrate judge's Findings and denying the state's motion to dismiss. A copy of that order is included as Exhibit D in the Appendix.

A petition for a writ of mandamus was filed with the Ninth Circuit on September 6, 1996, and was denied without argument on December 20, 1996.

## SUMMARY OF REASONS FOR GRANTING THE WRIT

This case involves a capitally convicted defendant's default of 35 constitutional claims that were first brought on state collateral attack in a second state habeas petition approximately 12 years after his judgment of conviction and more than four years after the California Supreme Court decided his direct appeal. The state court denied the claims on the grounds that they were untimely and should have been raised on appeal. Under the procedural default rule, Hayes should not be allowed to raise these claims in federal court. Yet, the Ninth Circuit has gutted California's default rules by summarily holding that they are not consistently applied.

This case presents the Court with a substantial question of national importance. It requires this Court to

resolve a conflict between the circuits which has arisen on the question of whether principles of comity and federalism prohibit the federal courts from placing the burden of proof on the state to prove that its timeliness requirements for capital habeas cases have been regularly and consistently applied before the federal courts will limit collateral review of claims which were not timely presented to the state courts.

Furthermore, this case presents the critical question of whether the Ninth Circuit may effectively strike down California's timeliness bar in capital habeas cases when there never has been a factual showing that California failed to regularly and consistently apply its timeliness requirements.

The third question raised by the Ninth Circuit's decision in this case is whether the federal courts may also refuse to honor California's forty-year-old procedural bar which prohibits defendant's from using habeas corpus as a substitute for their direct appeal (the so-called *Dixon* bar) where there has been no showing that the state failed to consistently and regularly apply this bar.

The Ninth Circuit's rejection of these two long established state procedural bars, timeliness and the *Dixon* bar, will have and already is having, devastating effects on California's attempt to expeditiously enforce capital punishment in this state. Striking down the timeliness bar will adversely effect over 80% of the death sentences which have been affirmed by the California Supreme Court. The Ninth Circuit's rejection of California's long-established timeliness requirements will geometrically expand the number of claims considered on their merits in the federal courts. In this case alone, it has doubled the number of claims to be decided by the federal court.

The fallout from this ruling is already wreaking havoc in California's capital cases. One federal magistrate judge has already refused to honor a state procedural bar finding and has recommended setting aside a 15-year-old

penalty trial for a claim which should never have been considered on the merits.

Another district court has filed an order indicating that 4 claims in a federal habeas corpus petition would be remanded back to the California Supreme Court for exhaustion but has also held that *if* the claims were found to be procedurally barred for untimeliness, such a state court finding have no effect when the defendant returns to federal court.

Comity and federalism demand that a ruling which has these devastating and unjust consequences not be allowed to stand. The State of California has a weighty interest in the finality of its judgments and in the prompt enforcement of its law. Both of these interests are served by the timeliness and *Dixon* bars which encourages defendants to raise and litigate all claims at the earliest opportunity. This case presents an important question of federal law affecting the most basic aspects of federalism, questions up to now unresolved by this Court, with especially far-reaching consequences in collateral attacks on state death penalty judgments.

## ARGUMENT

### I.

### THE NINTH CIRCUIT'S REJECTION OF THE CALIFORNIA SUPREME COURT'S EXPRESS TIMELINESS PROCEDURAL BAR FINDINGS OFFENDS BASIC PRINCIPLES OF COMITY AND FEDERALISM

The question presented in this case is extremely important since the Ninth Circuit's rejection of the California Supreme Court's express application of its timeliness procedural bar to 32 of Hayes' claims is an affront to comity and federalism and because this ruling has already had profound and unjust consequences on the recognition of this state's procedural rules.

As a result of the Ninth Circuit's decision, California will be forced to litigate in federal court numerous successive and untimely claims, many of which contain a number of subissues, which were properly procedurally barred by the state court. In this case, and in other cases, the state will also be forced to litigate claims which were procedurally defaulted under state law since they could have been, but unjustifiably were not, raised on appeal. *Ibid.* An appeal after the final resolution of this case in the district court will not mitigate this irreparable damage. *See In re Cement Antitrust Litigation*, 686 F.2d 1297, 1302 (9th Cir. 1982). If the state eventually spends time and money defending these claims and prevails on the claims on the merits, an appeal of the district court's decision on the procedural bars issue will be moot. "'A party may not appeal from a judgment or decree in his favor for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree'" [citation omitted].

*United States v. Good Samaritan Church*, 29 F.3d 487, 488 (9th Cir. 1994). If the state does not prevail on the merits of the claims and relief is granted on a claim which should never have been before the district court, a challenge to the district court's decision on the merits will force the state to fully litigate all 32 untimely claims that should have been and in fact were expressly found to be procedurally barred.[1] In either event, the state's authority to mandate that state prisoners comply with its valid procedural requirements is unjustifiably compromised.[2] More importantly, this unnecessary litigation is contrary to the weighty state interest in the

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1. The Ninth Circuit's erroneous rejection of California's timeliness bar leads to the inevitable conclusion that California's procedural bars here at issue may be respected by the federal courts, if at all, only in those cases where the direct appeal has been affirmed and first state habeas petition has been filed after July 29, 1993, the date of publication of *In re Clark* and *In re Harris*. As of February 1, 1996, there were 171 capital cases that had been affirmed on appeal by the California Supreme Court. California Department of Corrections, *CDC Condemned Inmate List: (Sentences Affirmed by the California Supreme Court)*, (Feb. 1, 1996). Only 31 of these capital cases were affirmed by the supreme court after *Clark* and *Harris*. Thus, the Ninth Circuit's rejection of the timeliness bar will result in the inability by the State of California to assert this bar in as many as 140 or 82% of its 171 pending capital cases.

2. One magistrate judge has already recommended granting federal habeas corpus relief as to the penalty phase of a fifteen-year old capital case for a claim which the California Supreme Court found was procedurally barred because it was untimely. *Bean v. Calderon*, USDC E.D. Cal. CIV S-90-0648 WBS/GGH Findings and Recommendations dated January 23, 1997. A petition for certiorari is now pending in *Bean*, No. 96-1355.

Another federal district court has recently filed an order indicating that 4 claims would be remanded to the California Supreme Court for exhaustion but that if the claims were found to be procedurally barred, these findings would have no effect in federal court. *Chayim Ben-Sholom v. Calderon*, USDC Ed. Cal. No. F-93-5531-OWW, Order 2/7/97.

finality of its judgment and enforcement of its laws. Without the clear, and immediate guidance of this Court's review of the validity of California's rules of procedural bar, the numerous California capital cases in federal court will all be subject to this unnecessarily protracted litigation.

Pursuant to the compelling mandates of comity and federalism, federal courts generally will not review the merits of a claim in a petition for writ of habeas corpus if the state courts denied the claim on state procedural grounds that are both independent of federal law and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 731-732 (1991). The standard has been stated as follows:

> A procedural default is not "independent" if, for example, the state procedural bar depends upon an antecedent determination of federal law. Similarly, the procedural default is not "adequate" if the state courts themselves bypass the petitioner's default and consider his claims on the merits, if the procedural rule appears to be discretionary, or, ordinarily, if the state fails to assert an interest in compliance with its procedural rules in the petitioner's federal habeas proceedings.

*Harmon v. Ryan*, 959 F.2d 1457, 1461 (9th Cir. 1992). Courts have also observed that "[n]ovel procedural requirements or those of whose existence the defendant could not reasonably be deemed to have been apprised, cannot be permitted to thwart review. . . ." *NAACP v. Alabama, ex rel. Flowers*, 377 U.S. 288, 297 (1964). Similarly, another federal court observed that "[a] state ground is adequate only if the state court acts in a consistent and principled way. A basis of decision applied infrequently, unexpectedly, or freakishly may be

inadequate, for the lack of notice and consistency may show that the state is discriminating against the federal rights asserted." *Prihoda v. McCaughtry*, 910 F.2d 1379, 1383 (7th Cir. 1990), citing *Johnson v. Mississippi*, 486 U.S. 578, 587-589 (1988). This Court also has held that, before a state procedural rule can be considered adequate and independent to bar federal court consideration, the rule "must have been 'firmly established and regularly followed' by the time as of which it is to be applied." *Ford v. Georgia*, 498 U.S. 411, 424 (1991). California believes it has followed these rules and that the Ninth Circuit may not disregard California's well-established procedural bars. The state submits that California's rules of procedural bar, both before and certainly after *Clark* and *Harris* were decided, meet these requirements.

**A. California's Timeliness Requirements Were Applicable To Petitions For Writ Of Habeas Corpus In Capital Cases Filed Prior to 1993**

California courts have consistently held that a state habeas petitioner must assert all claims known to him in a timely manner and that a petitioner must fully explain and justify any substantial delay in asserting known claims. *In re Clark*; *In re Stankewitz*, 40 Cal.3d 391, 396, n. 1 (1985); *In re Walker*, 10 Cal.3d 764, 774 (1974).

In June of 1989, the California Supreme Court published a detailed set of guidelines pertaining to the timeliness requirements applicable to state habeas petitioners in capital cases, entitled "Supreme Court Policies Regarding Cases Arising From Judgments of Death," (hereinafter "the Policies"). The Policies provided:

> 1--1 Appellate counsel in capital cases shall have a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas

corpus. The duty to investigate is limited to investigating potentially meritorious grounds for relief that have come to counsel's attention in the course of preparing the appeal. It does not impose on counsel an obligation to conduct, nor does it authorize the expenditure of public funds for, an unfocused investigation having as its object uncovering all possible factual bases for a collateral attack on the judgment. Instead, counsel has a duty to investigate potential habeas corpus claims only if counsel has become aware of information that might reasonably lead to actual facts supporting a claim. All petitions for writs of habeas corpus should be filed without substantial delay.

1--1.1 A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 60 [now 90] days after the final due date for the filing of appellant's reply brief on the direct appeal.

1--1.2 A petition filed more than 60 days [now 90] days after the final due date for the filing of appellant's reply brief on the direct appeal may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel (a) knew, or should have known, of facts supporting a claim *and* (b) became aware, or should have become aware, of the legal basis for the claim.

1--1.3 Alternatively, a petition may establish absence of substantial delay if it alleges with specificity facts showing that although petitioner or counsel was aware of the factual and legal

> bases for the claim before January 16, 1986 (the date of finality of *In re Stankewitz* (1985) 40 Cal.3d 391, 396-397, fn. 1, the petition was filed within a reasonable time after that date.

*See* California Supreme Court, *Standards for Preparation and Filing of Habeas Corpus Petitions Relating to Capital Cases and For Compensation of Counsel in Connection with Those Cases*, 50 Cal.3d 1-4 (Dec. 1993) (emphasis in original).

These were the standards in place in 1994 at the time Hayes filed his second state petition for writ of habeas corpus. Counsel also knew that these standards applied in 1989 to Hayes' case while his direct appeal was still pending before the California Supreme Court and in 1994, counsel sought to explain the delay in the filing of these clearly untimely claims when the second state habeas petition was filed. The language of these standards clearly indicate their applicability to Hayes' case while it was still active in the state courts.

The Ninth Circuit's position is that Hayes' procedural default must be examined at the time it occurred. Fair enough. However, according to the Ninth Circuit, the default occurred at some nebulous time prior to the California Supreme Court's 1993 decisions in *Clark* and *Harris* when Hayes consciously gambled that under California law he could freely file an infinite amount of untimely and successive petitions. This was never the law in California and in actuality, Hayes defaulted 35 of his claims on April 22, 1994, when he filed an untimely second petition without adequate justification for the delay.

**B. The Ninth Circuit Incorrectly Concluded That California's Timeliness Procedural Requirements Were Not Independent And Adequate State Procedural Bars To Federal Review**

In the instant case, 32 of the claims asserted by Hayes in his 1994 second Petition for Writ of Habeas Corpus were rejected by the California Supreme Court on the procedural grounds of being untimely. The Ninth Circuit concluded that the procedural bars relied upon by the California Supreme Court were not "adequate" to preclude federal review, especially in light of the California Supreme Court's decision in *In re Clark* at 750. The Ninth Circuit reasoned that, prior to *Clark*, California courts had not consistently applied *any* procedural bar in a consistent way, citing *Siripongs v. Calderon*, 35 F.3d 1308 (9th Cir. 1994), cert. denied, 115 S.Ct. 1175 (1995) and *Karis v. Vasquez*, 828 F.Supp. 1449 (E.D.Cal. 1993), and that to apply the timeliness bar to Hayes in the instant case would be an unfair retroactive application of the allegedly stricter timeliness standards articulated in *Clark*.

The crux of the Ninth Circuit's error is that the court has blurred the distinction between the California Supreme Court's analysis in *Clark* with respect to the successive petitions procedural bar and that of the timeliness procedural bar. Even the Ninth Circuit recognized in *Paradis v. Arave*, 954 F.2d 1483 (9th Cir. 1992) that, in evaluating the adequacy of state procedural bars, federal courts must focus on the particular procedural bar invoked in the case at hand. The fact that one particular state procedural bar may be subject to attack on the ground it has been inconsistently or irregularly applied does not justify the inference that a different state procedural bar has been inconsistently or irregularly applied. *Id.* at 1493; see *Moran v. McDaniel*, 80 F.3d 1261, 1996 U.S. App. Lexis 6101 (9th Cir. 1996) [upholding Nevada's untimeliness procedural bar while

distinguishing *McKenna v. McDaniel*, 65 F.3d 1483 (9th Cir. 1995), which found another Nevada bar based on a failure to object at trial inadequate to forestall federal review]. Disregarding *Paradis*, the Ninth Circuit in the instant case inferred from the admission in the *Clark* opinion that previously the successive petitions procedural bar had not been regularly and consistently applied in California that this same inconsistency applied equally to California's application of the timeliness procedural bar. Such an inference is erroneous as the histories of the two procedural bars, successive petitions and timeliness, are quite different. More importantly, nothing in *Clark* suggests that the California courts have not regularly or consistently applied the timeliness procedural bar, nor has it even been *proven* otherwise.

Any determination of the adequacy of California procedural bars requires an examination of *Clark* in which the California Supreme Court gave a complete analysis of several state procedural bars to petitions for writ of habeas corpus. The court examined, separately, both the successive petitions bar and the timeliness bar. *In re Clark* at 767-782. First, in reviewing the history and application of California's procedural bar to the filing of successive petitions, the court candidly admitted:

> Our past decisions have thereby suggested that the rules *against piecemeal presentation of claims* and repetitious petitions are subject to undefined exceptions and that the court may be willing to entertain multiple collateral attacks on a judgment notwithstanding the potential for abusive writ practice.

Emphasis added; *id.* at 768. It is this language that the Ninth Circuit has eagerly adopted and used to support its view that the decision in *Clark* signalled a drastic change in California's timeliness standards.

However, such reliance ignores the fact that the quoted language is found in the section of the state court opinion entitled "Repetitious and piecemeal claims" (*In re Clark* at 767), which limited itself to a discussion of California's two longstanding rules against repeated applications for relief on previously rejected claims and against piecemeal presentation of habeas claims. The Ninth Circuit turned a deaf ear to the California Supreme Court's assertions under the separate section entitled "Delay." There the California Supreme Court observed, "Our decisions have *consistently required* that a petitioner explain and justify any substantial delay in presenting a claim. [Citation omitted; emphasis added.]" *In re Clark* at 783. The state submits that, if the California Supreme Court's admission of inconsistent application of the bar against successive petitions prior to *Clark* is readily accepted by the Ninth Circuit without question or analysis, so too must it accept the California Supreme Court's express assertion of a consistent requirement that substantially delayed claims have had to be justified. Ninth Circuit law required that Court to presume that the California Supreme Court "has carried out its [state law] obligations even when it does not expressly indicate in its opinion that it has done so." *Beam v. Paskett*, 3 F.3d 1301, 1306 (9th Cir. 1993).

In rejecting the petitioner's argument in *Clark* that the Policies should not apply to him, the California Supreme Court observed, contrary to the Ninth Circuit here, that:

> Even before June 1989, a habeas corpus petitioner who had knowledge that grounds for a habeas corpus petition existed *was on notice* that any substantial delay in filing a petition after the grounds became known had to be justified. *In re Stankewitz* at 396, fn. 1.

Emphasis added; *id.* at 782. Moreover, the state court did not suggest that the publication of the Policies, or its decision in *Clark*, altered that court's longstanding approach to the timeliness bar. The Policies merely set forth a presumption of timeliness and referred directly to *Stankewitz*, as the appropriate standard for assessing timeliness. *In re Clark* at 783. Consequently, the court rejected an argument that the Policies changed any preexisting timeliness requirements. *Id.* at 785. To the extent the Policies did add a duty to counsel to investigate possible claims, the California court also allowed a state petitioner to present claims discovered as a result of investigation commenced promptly after the Policies became effective on June 6, 1989. *Ibid.*

Thus, contrary to the Ninth Circuit's conclusion, the California Supreme Court's holding in *Clark* did *not* indicate that its prior holdings with respect to the timeliness bar were inconsistently applied. And, importantly in the instant case, the California courts have always required that a state habeas petitioner justify any substantial delay in filing a habeas petition. Hayes knew this since he made an extensive but unsuccessful attempt in his second habeas petition to justify the delay in presenting his new claims. He failed as to 32 of these claims.

This case is unlike that of *Ford v. Georgia* at 411. In *Ford*, upon which the Ninth Circuit placed special emphasis, the Georgia Supreme Court changed the specific period in which a criminal defendant could challenge his jury selection/composition and preserve the issue for review to a time past that in which that petitioner could have complied. *Id.* at 422. This Court found that applying the novel rule retroactively would apply a rule unannounced at the time of trial (*id.* at 424-425), which apparently was the only time the issue could have been preserved. Not so in the instant case where the California high court was not called upon to exercise

discretion because Hayes gave the state court no real facts in his second state petition upon which justification for the delay could have been found as to all but eight of his 44 claims.

Unlike the defendant in *Ford*, Hayes was not absolutely deprived of his day in court in that he was given the opportunity to justify the substantial delay in presenting his 44 unexhausted issues to the state high court. Nor was the requirement of justification, whatever its form, a novel or unexpected rule applied without notice at a time when Hayes could not comply. *See, e.g., Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995) [no problem of retroactivity noted where state court dismissed petitioner's third state petition, which, in that subsequent petition, cited no "cause" for raising claim that existed at time of first writ, even though the state court had not in the past regularly and strictly applied its abuse of the writ rules]; *Pearson v. Norris*, 52 F.3d 740 (8th Cir. 1995); also *Tredway v. Farley*, 35 F.3d 288, 292-295 (7th Cir. 1994). Without a showing by Hayes of adequate justification, the California Supreme Court followed its well established rule that such petitions be summarily denied. *In re Clark* at 797. Because California's timeliness requirements for capital habeas petitions were well-established and consistently applied in 1994 at the time Hayes unsuccessfully attempted to make such a showing, the Ninth Circuit stuck a mortal blow to the basic precepts of comity and federalism when it found that California's timeliness procedural bar was not an adequate state rule to foreclose federal review of the 32 issues belatedly raised by Hayes in his second state habeas petition.

## II.

## THE NINTH CIRCUIT HAS ADOPTED A RULE OF REJECTION WITHOUT ANY FACTUAL SUPPORT FOR THE NOTION THAT THE CALIFORNIA SUPREME COURT FAILED TO REGULARLY AND CONSISTENTLY APPLY ITS TIMELINESS PROCEDURAL BAR

Without ever considering if the factual premise of its holding was true, the Ninth Circuit has accepted as gospel, the proposition that the California Supreme Court did not regularly and consistently apply its timeliness bar prior to the 1993 opinion in *Clark*.

The authority cited by the Ninth Circuit for the truth of this proposition traces its questionable lineage back to *Karis v. Vasquez*, in which the district court held that since state court procedural bar findings amounted to an affirmative defense in a federal habeas corpus proceeding, the state had the burden of proving not only that the state court had applied the bar in that case but also that the California Supreme Court had also regularly and consistently done so in the past. It did not satisfy the district court that the California Supreme Court had expressly held in *Clark* that the timeliness bar had been regularly and consistently applied prior to the decision in that case. The district court still saw fit to place the burden of proof on the California Supreme Court to prove a negative rather than requiring the party challenging the bar to show that it had not been regularly applied.

Relying on *Karis*, the Ninth Circuit was also is unwilling to recognize that California courts had a valid, well established timeliness requirement which was in place well *before* the California Supreme Court's decisions in *Clark*, as well as a longstanding requirement prior to

*Harris* that issues that could have been raised on appeal could not be considered for the first time on habeas review. The rejection of California's timeliness procedural bar also results in the inevitable conclusion that, with respect to most of the capital cases pending in the district courts in California, the state cannot ever have valid successive petition, timeliness, or *Dixon* procedural bar that are recognized by the federal courts, regardless of how unjustifiable the failure to bring the claim, or how unreasonable the delay.

In short, the Ninth Circuit's ruling places a higher value on rewarding a state habeas petitioner for gambling that the federal courts will find that the state may not enforce its procedural rules, than the value placed on the state's valid interest in having its procedural rules recognized by the federal courts, and the concomitant state interest in the finality of its judgments. *Wainwright v. Sykes*, 433 U.S. 72, 91 (1977). The Ninth Circuit's purported balancing of these interests, as evidenced in its ruling, is incorrect. Now, only this Court is in a position to stop this legal carnage and to correct the patent injustice which will result from adherence to the Ninth Circuit's erroneous order.

The factual proposition that California did not regularly and consistently apply its timeliness requirements prior to 1993 has never been proven. The rejection of California's long-standing timeliness bar is based solely on a burden of proof question.

It offends comity and federalism to require the California Supreme Court to prove that it has regularly applied its timeliness requirements in habeas corpus cases, especially where the state's highest court has expressly held that it has done so.

Rather than placing the burden of proof on the question of regular and consistent application on the state, the burden should instead be on the party challenging the application of the bar. Once the state has proved that the

bar was applied, it is the defendant who should have to prove that the bar was not regularly enforced if that is his assertion.

In this regard, it is erroneous to regard a state court procedural bar finding as an "affirmative defense" as that term is used in civil actions. Unless this court grants certiorari on this important issue, the Ninth Circuit's rule of rejection will continue to require that the California Supreme Court prove that it has regularly and consistently applied its timeliness requirements whenever enforcement of a bar is questioned.

Such a rule is demeaning and offends California's sovereignty and is contrary to the basic principles of comity and federalism. The first authority to hold that the state has the burden of proof was *Karis v. Vasquez*, which held that the state has the burden to establish that the default is adequate and regularly imposed.

California submits that such a burden, which appears to be both a burden of both proof and persuasion, is contrary to the presumption that judges act according to law. *U.S. v. Throckmorton*, 873 F.3d 1069, 1072-1073 (9th Cir. 1996). In addition, it is contrary to the shifting of the burden of proof in analogous defenses. Thus, *Goecke v. Branch*, ___ U.S. ___, 115 S.Ct. 1275 (1995) indicates that the burden is upon petitioner to identify existing precedent demonstrating inapplicability of *Teague v. Lane*, 489 U.S. 288 (1989). And *McCleskey v. Zant*, 499 U.S. 467, 494-495 (1991), places the burden on the state to plead abuse of the writ but then shifts the burden to petitioner to establish inapplicability of the bar. California is aware of no Circuit Court of Appeal or United States Supreme Court opinion which allocates this burden to show a negative to the state. In fact, the practice in the circuits is to the contrary. *See*, e.g., *Dugger v. Adams*, 489 U.S. 401, 410 (1989) (*petitioner's* citation to a few state cases where the procedural bar was ignored is insufficient to demonstrate inadequacy); *Smith v. Dixon*, 14

F.3d 956, 972 (4th Cir. 1994) (petitioner failed to demonstrate bar not consistently applied); *Wheat v. Thigpen*, 793 F.2d 621, 625 (5th Cir. 1986) (petitioner argues not uniformly applied); *Prihoda v. McCaughtry*, at 1383-1384 (7th Cir. 1990) (petitioner failed to demonstrate inadequacy of bar); *Wyles v. Hundley*, 59 F.3d 247, 252 (8th Cir. 1995) (petitioner's claims fail to consider bar applied in overwhelming majority of cases). On certain occasions, the Ninth Circuit follows the same procedure. In *Morales v. Calderon*, 85 F.3d 1387, 1389 (1966), it was the petitioner Morales who argued against application of the pre-*Clark* timeliness bar. And in *Forrest v. Vasquez*, 75 F.3d 562, 564 (9th Cir. 1996), the Ninth Circuit recited simply that there was nothing to indicate that the bar in that case was not firmly established. In other words, no burden was placed on the state to show that it was firmly established.

The same is true in this case. Nothing has ever been produced which indicates the timeliness bar is not firmly established and uniformly applied. The Ninth Circuit has simply assumed this to be true without any factual basis to support this assumption.

There is no indication from any case that delay is ignored. It is evident that an unexplained delay of seven years in petitioner's case is violative of the rule. The default should be honored by this Court.

The Ninth Circuit in the instant case, like the court in *Karis*, has ignored the distinction between the successive petitions bar and the timeliness bar. Even assuming the successive petitions bar, prior to the decision in *Clark*, would not have been an adequate state procedural bar to preclude federal review under *Siripongs*, the timeliness bar is not subject to the same analysis. The timeliness bar in California is longstanding; the Policies defining timeliness predated Hayes' second state habeas petition by nearly five years; the California Supreme Court's ruling in *Clark* predated Hayes' second state

habeas petition by almost one year. Thus, Hayes was clearly on notice that he was required to adequately justify any delay, and although he tried, he failed to do so. Application of the timeliness bar was not infrequently, unexpectedly, or freakishly applied to Hayes. *See Johnson v. Mississippi* at 587-589. Nor has proof ever been offered that the contrary is true. This Court should therefore grant certiorari to review the Ninth Circuit's finding that California's timeliness and successive petitions bars were not "adequate" to preclude federal review.

## III.

## THE NINTH CIRCUIT'S REJECTION OF CALIFORNIA'S FORTY-YEAR-OLD *DIXON* BAR IS UNJUSTIFIED UNDER ESTABLISHED PRINCIPLES OF COMITY AND FEDERALISM

In this case, the California Supreme Court found that three of the claims set forth in the second habeas corpus petition should have been raised in the direct appeal and were therefore procedurally barred under the state's forty-year-old *Dixon* bar.

The district court in this case denied the state's motion to dismiss and found that the *Dixon* bar had not been regularly and consistently applied before *Harris*. The question was presented to the Ninth Circuit.

Rather than deciding the question, the Ninth Circuit instead relied upon the clearly erroneous standard and upheld the district court's denial of the motion to dismiss.

Rather than decide whether California had regularly and consistently applied the bar before *Harris*, the Ninth Court contributed to the confusion in capital litigation in California by apparently allowing the district courts in this state to continue to decide this crucial question on a case by case basis. The Ninth Circuit did not provide any guidance on the issue nor did it decide the question. It simply held that a refusal to honor the bar was not clearly erroneous. By implication, an order dismissing a claim by upholding the bar would also be upheld under the clearly erroneous standard.

In doing so, the Ninth Circuit acknowledged that there is conflicting authority on this question within the circuit. There is even conflicting federal authorities on the basic question of why the bar should not be recognized.

Noting that *Karis* and *Odle* offer different reasons for refusing to recognize the *Dixon* bar, the Ninth Circuit still would not resolve the question.

In spite of the Ninth Circuit's recognition that the *Dixon* bar has been the law in California since 1953, the Court held that Hayes was not on notice in 1990 that he should raise the issues which were cognizable on appeal, in his automatic appeal or default them.

Again, the *Dixon* default did not occur when Hayes "had an opportunity to raise the claims on direct appeal" and instead occurred when Hayes waited, without adequate reasons, until 1994 to file claims in a successive habeas petition which were cognizable in his direct appeal. In *Deere v. Calderon*, 890 F.Supp. 893, 901 (C.D. Cal. 1995) the district court observed "[t]he California Supreme Court recognized the continuing vitality of [the *Dixon*] rule in *In re Harris*. . . ." More recently, in *Forrest v. Vasquez*, the Ninth Circuit indicated that the *Dixon* bar is applicable to preclude review of a claim in federal court.

It is true that the California Supreme Court stated in *Harris* that it would narrow the "fundamental constitutional rights" exception to the *Waltreus* (*In re Waltreus*, 62 Cal.2d 218 (1965) procedural bar [which precludes review on habeas of issues already decided on appeal], *see Harris*, at 834.[3] However, the court did not suggest that the narrowing of the exception was based on any inconsistent application of the bar in previous cases. Instead, the court reasoned that narrowing of the *Waltreus* exception was appropriate, given the expansion of the ineffective assistance of counsel doctrine, which frequently overlapped the "fundamental constitutional rights"

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3. Respondents recognize that *Harris* dealt specifically with the *Waltreus* procedural bar, which the court termed a "corollary of the rule in *Dixon*," *see Harris*, at 829; however, the court also made clear that much of its discussion equally applied to the *Dixon* rule. *See id.*, at 825, n. 3.

exception. *Id.* at 831-834. The court made no such explicit or implicit acknowledgment that its prior applications of the *Dixon* or *Waltreus* bar had been applied inconsistently. The court did state that achieving the proper balance between the state's weighty interest in the finality of judgments and the individual's right to a fair trial has not always been clear, *see Harris*, at 830; but the court did not suggest that the difficulty in balancing these competing interests was reflected by an inconsistent application of the *Waltreus* bar.

California acknowledges that in *Odle v. Calderon*, 884 F. Supp. 1404 (N.D.Cal. 1995), the district court held that the *Dixon* bar had not been regularly and consistently applied. *Id.* at 1413-1414. In *Odle*, the district court purported to "agree[] with the reasoning of three other district courts that the Dixon procedural rule has not been uniformly and regularly applied by the California Supreme Court."[4] *Id.* at 1413.

The third of these cases, *Karis v. Vasquez*, represents a misreading of California's application of the *Dixon* procedural bars. In *Karis*, the district court stated that the California courts "have repeatedly held that the rule that claims not raised on appeal are not cognizable

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4. The cases referred to by the district court were *Kimble v. Vasquez*, CV 90-4826 SVW (C.D.Cal. August 25, 1993); *Karis v. Vasquez*; *Murtishaw v. Vasquez*, CV 91-508 OWW (E.D. Cal. 1993).

Two of the three cases cited by the district court were unpublished opinions, and thus their precedential weight is negligible in light of Ninth Circuit Rule 36-3 which prohibits citation to unpublished orders or memoranda. In this same vein, it may be worth noting that several other unpublished orders have recognized the validity of California's procedural bar under *Dixon* and have applied it in federal habeas proceedings. *See Dull v. Pickett*, No. 94-56722 (9th Cir. June 12, 1995) at 4; *Velasquez v. Borg*, No. 93-16129 (9th Cir. April 15, 1994) at 3; *Sanchez v. Marshall*, No. 93-15309 (9th Cir. December 1, 1993) at 6; *Jones v. Vasquez*, C 91-3557 HP (N.D. Cal. June 3, 1994) at 13-14.

on habeas is 'merely a discretionary policy governing the exercise of the reviewing court's jurisdiction to issue the writ.'" *Karis*, at 1467, *quoting In re Wallace*, 3 Cal.3d 289, 292 (1970), and *In re Black*, 66 Cal.3d 881, 887 (1967). However, the California Supreme Court in *Wallace* made clear that the discretion was not unfettered. Rather, the court stated:

> [T]he "requirement of exhaustion of the appellate or other remedy . . . is merely a discretionary policy governing the exercise of the reviewing court's jurisdiction to issue the writ." *In re Black*, 66 Cal.2d 881, 887 (1967), *quoting* from Witkin, Cal. Criminal Procedure 769 (1967). *When special circumstances are shown,* compliance with this "requirement" may be excused and the petition may be considered on its merits.

*In re Wallace*, at 292. Italics added. Thus, understood in its proper context, the "discretion" of the court is limited to "special circumstances," just as other adequate procedural bars are also omitted by certain exceptions. Simply put, so long as "exceptions" are consistently applied, they do not undermine the adequacy of state procedural bars. *See Dugger v. Adams*, at n. 6; *Andrews v. Deland*, 943 F.2d 1162, 1190 (10th Cir. 1991); *Prihoda v. McCaughtry*, at 1383-1384.

It is therefore clear that *Harris* did not signal a recognition that the *Dixon* bar had been inconsistently applied; it only signalled a narrowing of the criteria for applying the bar. As such, the California Supreme Court's decision in *Harris* should not undermine, in any way, the adequacy of the *Dixon* bar to preclude federal review. And even if *Harris* did signal a significant change, it nevertheless gave Hayes a way to avoid the default by adequately explaining his failure to pursue certain claims

on appeal. However, because Hayes failed to do so, as evidenced by the California Supreme Court's order, there is no reason not to apply the *Dixon* bar to Hayes post-*Harris* petition.

As the district court in *Deere* highlighted, the *Dixon* rule had been law for the past 40 years. *Deere*, 890 F.Supp. at 901.

A survey of the California Supreme Court cases addressing *Dixon* from 1953 to 1993 reveals consistent application of a clearly stated rule that "habeas corpus cannot serve as a substitute for appeal." *In re Harris*, 5 Cal.4th 813, 829 (1993); *In re Jackson*, 3 Cal.4th 578, 586, fn. 2 (1992) [applying rule to reject claim]; *Mitchell v. Superior Court*, 49 Cal.3d 1230, 1236, fn. 2 (1989) [applying rule to reject several claims]; *In re Walker* [applying rule to reject claim]; *People v. Jones*, 9 Cal.3d 546, 560, fn. 7 (1973) [applying rule to reject claim]; *In re Brown*, 9 Cal.3d 679, 682 (1973) [applying rule to reject claim]; *People v. Morrison*, 4 Cal.3d 442, 443, fn. 1 (1971) [applying rule to reject several claims]; *In re Crow*, 4 Cal.3d 613, 622, fn. 9 (1971) [noting "special circumstances" exception]; *In re Terry*, 4 Cal.3d 911, 921 (1971) [applying rule to reject claim]; *In re King*, 3 Cal.3d 226, 229, fn. 2 (1970) [exception based on change in controlling law]; *In re Antazo*, 3 Cal.3d 100, 107-108 (1970) ["special circumstances" exception]; *In re Wallace* ["special circumstances" exception]; *In re Lopez*, 2 Cal.3d 141, 151 (1970) ["special circumstances" exception]; *In re Bushman*, 1 Cal.3d 767, 776 (1970) [exception based on unlawful sentence]; *In re Bevil*, 68 Cal.2d 854, 862 (1968) [exception based on unconstitutional statue]; *In re Malloy*, 66 Cal.2d 252, 254 (1967) [applying rule to reject claims]; *In re McGrew*, 66 Cal.2d 685, 688 (1967) [applying rule to reject claim]; *In re Black*, 66 Cal.2d 881, 886-887 (1967) [exception based on unlawful sentence]; *In re Ring*, 64 Cal.2d 450, 453 (1966) [rule applied to reject several claims]; *In re Spencer*, 63 Cal.2d 400, 406 (1965) [exception

based upon change in controlling law]; *People v. Polk*, 63 Cal.2d 443, 448 (1965) [exception based upon change in controlling law]; *In re Varnum*, 63 Cal.3d 629, 631 (1965) [exception based upon change in controlling law]; *In re Lessard*, 62 Cal.2d 497, 503 (1965) [applying rule to reject claim]; *In re Shipp*, 62 Cal.2d 547, 556 (1965) [applying rule to reject claims]; *In re Jackson*, 61 Cal.2d 500 (1964) [exception to rule based upon change in controlling law]' *In re Mitchell*, 56 Cal.2d 667, 671 (1961) [applying rule to reject claim]; *In re Harris*, 56 Cal.2d 879, 882-883 (1961) [applying rule to deny claim alleging violation of constitutional rights in admission of evidence]; *Neal v. State of California*, 55 Cal.2d 11, 16-17 (1960) [exception to rule based on "jurisdictional" defect]; *People v. Brown*, 55 Cal.2d 64, 74-75 (1960) [citing rule in support of holding that indigent defendant should be provided appointed counsel on appeal]; *In re Clark*, 51 Cal.2d 838, 841 (1959) [finding exception to rule where claim raises jurisdictional defect]; *In re Bine*, 47 Cal.2d 814, 817-818 (1957) [finding exception to rule where claim could not have been raised on appeal]; *In re Barges*, 44 Cal.2d 241, 247 (1955) [applying rule to reject claim]; *In re Chapman*, 43 Cal. 385, 390 (1954) [applying rule to reject claim]. *See also Acosta-Huerta v. Estelle*, 7 F.3d 139, 141-142 (9th Cir. 1992) ["California's general rule is that habeas corpus cannot serve as a substitute for appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not raised upon a timely appeal. . . . *People v. Sumstine*, 36 Cal.3d 909. . . . (1984)"].

Coincidentally,t he number of cases cited above where the rule was applied to bar the habeas claim matches the number of cases cited by this Court in finding that the Florida Supreme Court "faithfully applied its rule that claims not raised on direct appeal cannot be raised on postconviction review," and thus that the Florida

procedural bar equivalent to the *Dixon* rule constituted an "independent and adequate" ground to bar federal collateral review. *Dugger v. Adams*, at 410-411.

These egregious errors must be corrected or they will further mire California's attempt to enforce its death penalty in a sea of litigation in federal district courts over claims which have been found to be defaulted by the California Supreme Court. If comity and federalism are to have any real application to federal habeas corpus, California's independent state procedural bars must be treated with respect and deference by the federal courts.

## CONCLUSION

Accordingly, for the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit in the case at bar.

Dated: April 22, 1997.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General

WILLIAM G. PRAHL
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

WGP:msd